UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S SECURE SOLUTIONS (USA) INC., *etc.*	
and	Case 12-CA-26644
THOMAS FRAZIER, an individual	Case 12-CA-26811
CECIL MACK, an individual	

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Respondent G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc. ("Respondent" or "G4S")) submits the following Exceptions to the Supplemental Decision of Administrative Law Judge ("ALJ") Robert A. Ringler dated December 20, 2018 ("Decision"):

Exception No. 1:

In Section VI(B)(1)(a) of the Decision, the ALJ erroneously failed to adjust Cecil Mack's interim earnings for the third quarter of 2010, based on the fact that Mack started working for Rent-A-Wheel in mid-August 2010 rather than late-September 2010. (*See* Transcript of May 23, 2018 Hearing ("Tr.") at 31.)

Argument in Support:

Mack's undisputed testimony is that he started working for Rent A Wheel "in the middle of August 2010." (Tr. at 31; *see also* Tr. at 67 (Mack started this job "[r]ight in the middle" of August 2010).) And, in fact, the ALJ took note of this fact in a different section of his Decision. Specifically, in Section V(B)2) of the Decision, the ALJ stated that, "[i]n August 2010, Mack started worked for Rent-A-Wheel."

The ALJ was correct that Mack did not become *the store manager* until he was promoted to that position in late-September 2010, at which time he started earning an annual salary of $44,000.00. The ALJ was incorrect, however, in refusing to recognize that Mack was employed by Rent-A-Wheel as of mid-August 2010 in some other capacity and, as such, had interim earnings from mid-August 2010 through late-September, and which were not reflected in the Amended Compliance Specification ("Specification"). Specifically, Mack testified that he was making approximately $600.00 per week as a *collection specialist* (and then assistant store

manager) at Rent-A-Wheel during that period of time. (Tr. at 68; *see also* General Counsel Exhibit 4 at p. 6.)

As set forth in the Specification, Appendix H, Mack was credited with only $901.94 of interim earnings for the third quarter of 2010, which resulted in net backpay of $18,941.28 for that quarter. Based on Mack's testimony that he started with Rent A Wheel "right in the middle" of August 2010, that means he started working in the collection specialist position on or about August 16, 2010. Based on the record evidence, he had interim earnings equal to $600.00 per week from August 16, 2010 through September 30, 2010, for total interim earnings in that quarter of $4,200.00 (rather than the $901.94 of interim earnings shown in the Specification). That means the net back pay for the third quarter of 2010 should be $15,643.22 (rather than $18,941.28).

Exception No. 2:

In Section VI(B)(1)(c) of the Decision, the ALJ erroneously failed to adjust Cecil Mack's interim earnings for the second quarter of 2011, based on the fact that Mack was not terminated from Rent-A-Wheel until approximately mid-June 2011. (Tr. at 35.)

Argument in Support:

Mack was terminated from Rent A Wheel in "about the middle" of June 2011. (Tr. at 35.) The ALJ determined that, because Mack stated that it was "probably" about the middle of June, his testimony on this point should not be credited. While perhaps reasonable minds can differ on what specific date should be used as the relevant date to constitute the "middle" of the month of June 2011, it was not unreasonable for Respondent to propose June 17 as the relevant date.

Even if it is appropriate to adjust the date, it was error for the ALJ simply to ignore this point because Mack did not testify with perfect clarity on this point.[1]

Assuming Mack was terminated no earlier than June 17, then he was making approximately $846.15 per week from the start of the third quarter of 2011 until June 17, which is a total of eleven weeks. That results in total interim earnings for that quarter of $9,307.65 (rather than $8,557.60). As such, the next backpay for the second quarter of 2011 should be $10,703.51 (rather than $11,453.56).

Exception No. 3:

Since Mack was terminated from Rent A Wheel for "taking an improper payment" (Tr. at 35), the ALJ erroneously concluded in Section VI(B)(1)(d) of the Decision that "G4S failed to show that Mack's Rent-A-Wheel firing should toll backpay."

Argument in Support:

It is undisputed that Mack was terminated by Rent A Wheel in the middle of June 2011 for "taking an improper payment." (Tr. at 35.) While the details surrounding that incident are not entirely clear, it ***is*** clear that Rent A Wheel terminated Mack for conduct that it viewed as essentially fraudulent. Mack attempted to explain what he was doing with customer payments:

> The way it works, if – we have is what is called a receivable balance. So if a customer comes and they make a payment, if they make an extra, an extra 50 bucks, after 100 bucks, that money goes into what is called their receivable account. So when they want to pay off their account, they just use that money

[1] The ALJ suggests that the lack of clarity on this point justifies ruling against Respondent because Respondent could have subpoenaed Mack's records from Rent-A-Wheel. Respondent subpoenaed such materials directly from Mack. Unfortunately, Respondent had no way to know until the hearing, when Mack provided his responses to the Subpoena Duces Tecum, that Mack would not be providing such basic documents as copies of his pay stubs from his interim employment. Since there is no pre-hearing discovery in such proceedings, it seems eminently unfair to hold Mack's lack of ability or willingness to provide such basic, responsive documents against the Respondent.

that they have already credited to their account to bring down their balance, and they just pay off their remaining balance.

When I was in training, it was, it was common practice or how I was taught that if a, if a customer comes and they paid a – and they pay their account off before they are actually due, we'll just put all the money into that receivable balance, and then when they are due, we'll pay them off, kind of not, you know, ***don't take so many losses in one day***. But at that time it was the beginning of the quarter. A lot people was getting their income tax returns, so a lot of people was paying their accounts off because once you pass 90 days, it splits to a dollar and a half.

So, you have like a 90, like a 90-day same as cash deal, so a lot of people they come in, they come in December, they get wheels, and they try to pay it off with their income tax. I had a lot of money in my receivable account, and my district manager did an audit and saw that I had so much money in there, and I didn't know at the time that that was against company policy.

(Tr. at 35-36 (emphasis added).)

Mack offered the following, further explanation when asked about the incident again on cross-examination:

A. Let's say for instance you come, you owe 500 bucks on a jacket. You put – but your bill is only $50. So you give me $150 on the date that your bill is due. So the $50 goes towards your bill, and the $100 goes into your receivable account so you have an extra $100 in so next week or next time your account is due, if you want to pay your account off, you pay your account off minus whatever you have in your receivable account.

. . .

Q. What does the company think should have happened with that money instated of what was happening with the money?

A. You mean far as paying the account off?

Q. Correct.

A. It should have been paid off right as soon as they paid it and not being held until their due date.

. . .

Q. Is there, is there an advantage to the customer in it being done that way?

A. No. It's an advantage to the company, I would guess.

Q. Why would you guess that?

A. Why else would you – why else would you want to lose three or four accounts in one day?

Q. I don't – what do you mean by that?

A. If a customer pays their account off – if a customer pays their account off, then you no longer have that customer on your books, meaning your store doesn't look as big as it is.

(Tr. at 76-77.)

It is undisputed that Rent A Wheel terminated Mack for doing something improper with customer payments. Based on Mack's testimony, Rent A Wheel believed that his actions constituted a type of fraudulent practice because Mack's conduct allowed Mr. Mack (and his store) to show that he had more "open accounts" (and customers) at any given time than would be the case if customers' payments were applied to pay off their accounts as soon as the customer had paid the money to Mack. Also, by failing to apply the customers' payments to their balances at the time the money was received, that practice increased the odds that customers would not pay off their accounts on time – within 90 days – in which case Rent A Wheel (and presumably Mack) would benefit from all the additional interest that then would be owed by the customer.

While a termination from interim employment generally will not toll backpay, a termination will toll backpay if the discharge is based on deliberate or gross misconduct on the part of the discriminatee so as to establish a willful loss of employment, or if the discriminatee

commits an offense involving moral turpitude or that is so outrageous as to suggest deliberate courting of termination. *See, e.g.,* NLRB Casehandling Manual (Part Three) Compliance Section 10558.4; *Ryder System, Inc.*, 302 NLRB 608, 610 (1991); *P*I*E Nationwide*, 297 NLRB 454, 454 (1989).

It is instructive that, although Mack testified he was initially awarded unemployment benefits by the State of Florida, after Rent A Wheel contested the award, the State determined that Mack was not entitled to benefits. (Tr. at 38.) The standard for the denial of benefits is quite stringent. Although there are other possible reasons why a claimant could be denied benefits (*e.g.* failure to earn sufficient wages from that employer over a specific period of time, Fla. Stat. Ann. § 443.091(3)(g)), it can reasonably be assumed that Rent A Wheel contested the award of benefits to Mack based on the misconduct for which it terminated him: taking improper payments which, as Mack testified, constituted an alleged violation of Rent A Wheel policy.[2] (Tr. at 75.)

Florida's unemployment compensation statute, in relevant part, defines "misconduct" that disqualifies a claimant for benefits as follows:

> "Misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, . . . A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or

[2] Mack presumably met the threshold for eligibility for benefits based on amount of wages earned, period of time, etc., since the State initially awarded him benefits.

c. The rule is not fairly or consistently enforced.

Fla. Stat. Ann. § 443.036(29)(e)(1).

Mack testified at the Hearing that, as far as he was concerned, his conduct in question was permissible. (Tr. at 36.) He also testified at the Hearing that he was never told the conduct was not permissible, that no handbook or manual indicated the conduct was not permissible and that he was trained by the store manager (at the time he was hired) to handle such matters in the manner in which he did so (and then was terminated). (Tr. at 37.) As such, based on Mack's testimony at the Hearing, if his version of events is accurate, he would have been able to prove to the State of Florida that he did not know, and could not have known, about the rule (or policy) that he supposedly violated and for violation of which Rent A Wheel terminated him. In turn, based on such evidence, Mack would have been able to demonstrate that he did not engage in "misconduct" for which he could be denied unemployment benefits under Florida law. Mack failed to do so. As such, it is relevant that Rent A Wheel was able to meet the requisite standard and convince the State to deny Mack benefits based on this standard.

Mack implied in his testimony it was relevant that he did not appear at the unemployment hearing at which Rent A Wheel was able to get his award of benefits reversed, because he did not receive (or, more accurately, see) the notice of hearing on time (since he was in the process of moving). However, even if Mack did not appear at that hearing, Rent A Wheel still had the burden of proving, by a clear preponderance of the evidence, both that the act or acts alleged were committed and that Mack's actions constituted "misconduct" under the statutory definition. *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665, 666 (Fla. 3rd DCA 1992); *Tallahassee Housing Authority v. Florida Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986). *See also*

Williams v. Florida Dep't of Commerce, Industrial Relations Com., 326 So. 2d 237 (Fla. 3rd DCA 1976) (where doubts regarding the alleged misconduct are "nicely balanced," they are to be resolved in favor of the claimant).

Moreover, even if Rent A Wheel was able to convince the State to deny benefits only because Mack was not able to attend that hearing (because he did not receive notice), Mack did not suggest that he took advantage of his legal right to challenge that decision. First, if he could demonstrate that he missed the hearing for good cause, he would have been entitled to a new hearing.[3] Mack did not say anything to demonstrate that he attempted to pursue this option, despite the fact that he had to repay approximately $3,000 in benefits as a result of the decision rendered in the hearing he missed. (Tr. at 39.)

Second, Mack could have appealed the decision once he became aware that his award of benefits had been reversed.[4] A request for such an appeal hearing could have been filed within twenty calendar days after the determination was mailed or delivered to him. Fla. Stat. Ann. § 443.151(4)(b)(1).[5] While Mack claims to have not received notice of the appeal hearing, he

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[3] According to the Florida Department of Economic Opportunity's ("DEO") website, if an unemployment compensation benefits claimant misses a hearing, for good cause, he or she may request a new hearing by writing to the hearing officer by mail or fax, or by following the prompts in CONNECT, *available at* http://www.connect.myflorida.com. *See* DEO's Claimant FAQ page, *available at* www.floridajobs.org/job-seekers-community-services/reemployment-assistance-center/claimants-faqs. (CONNECT is the website used by claimants to initiate claims for unemployment compensation benefits in Florida.)

[4] The written decision of the appeals referee would have provided Mr. Mack with information on his appeal rights. Fla. Stat. Ann. §441.151(4)(b).

[5] A party who is dissatisfied with the decision may file a request for review with the DEO Reemployment Assistance Appeals Commission ("RAAC"). An RAAC order can also protested by filing an appeal with the appropriate Florida District Court of Appeals. Fla. Stat. Ann. § 443.151(4)(e). This can be accomplished by mail or overnight delivery, by sending a fax to the RAAC at (850) 488-2123, or by logging on to http://www.raaciap.floridajobs.org.

did not suggest in any way that he failed to receive the referee's decision denying him benefits. In fact, he testified that as a result of that decision he had to repay almost $3,000 in benefits he already had received. (Tr. at 39.) Therefore, the fact that the State of Florida denied Mack benefits (and that Mack did not attempt to or failed to get that decision reversed) demonstrates that Mack engaged in the type of misconduct that tolls back pay in this proceeding.

Since Mack was terminated by Rent a Wheel for an act involving moral turpitude – improper payments – backpay should be tolled from the time of that termination until he was hired by Rent a Center in February 2012. As such,

(a) his interim earnings for the second quarter of 2011 should be approximately $11,000.00 (rather than $8,557.60), which would result in net backpay of $9,011.16 (rather than $11,453.56);

(b) his interim earnings for the third quarter of 2011 should be approximately $11,129.95 (rather than $0.00), which would result in net backpay of $8,881.21 (rather than $20,011.16);

(c) his interim earnings for the fourth quarter of 2011 should be approximately $11,129.95 (rather than $0.00), which would result in net backpay of $10,420.53 (rather than $21,550.48); and

(d) his interim earnings for the first quarter of 2012 should be approximately $10,101.63 (rather than $4,178.58), which would result in net backpay of $10,113.34 (rather than $16,036.39).

Exception No. 4:

Since the record evidence demonstrates that one of Mack's interim employers, the United States Postal Service ("USPS"), contributed the amount of money at issue ($5,000.00) into a retirement plan on Mack's behalf and that Mack was 100% vested in that amount of money when he separated from the USPS (Tr. at 89), the ALJ erroneously concluded in Section VI(B)(3) of the Decision that "G4S failed to show that Mack's vested TSP retirement benefit from the USPS should be deducted from interim earnings."

Argument in Support:

Mack was hired by the USPS in March 2013. (Tr. at 53-54.) He testified that the USPS made contributions to a retirement plan on his behalf over a period of time, in the total amount of $5,000.00, and in which he was 100% vested at the time of his separation from the USPS. (Tr. at 89.) Since this was a substantial benefit to which he would not have been entitled had he been employed by Respondent at that time (Tr. at 89), the total net backpay calculation should be reduced by $5,000.00.

The ALJ rejected Respondent's argument, at least in part, because "the record does not indicate what percentage of this vested TSP benefit was paid by him [Mack] directly and deducted from his wages, or whether he might also be subject to extensive early withdrawal penalties, if the vested TSP balance were withdrawn and treated as interim earnings." (Decision at Section VI(B)(3).) On the contrary, however, when asked about the benefit, Mack testified that USPS made the contributions. There were no questions by General Counsel (or the ALJ) seeking to further clarify what that meant. As such, the undisputed evidence is that USPS made

the contributions. It was erroneous for the ALJ to seek to reach some different conclusion based on what some other theoretical evidence or question might have demonstrated.

In addition, the ALJ's "musings" about some potential withdrawal penalties are erroneous. First, there is no record evidence to support the finding of any such penalties. Second, even if the monies would have been subject to some such penalty, the issue is not what might have been left over after the application of such a penalty. The point is that, as a result of his termination by Respondent, while employed by USPS, Mack received the benefit of an additional $5,000.00 to which he is entitled at some point, even if some time in the distant future. Since the purpose of backpay in this proceeding is to make Mack whole, but not provide any sort of windfall to him, it is entirely appropriate to offset an equivalent amount of back pay by the amount of this added benefit.

Exception No. 5:

Since Mack worked an average of 50 hours per week when employed by Respondent (Tr. at 69-70), the ALJ erroneously concluded in Section VI(B)(4) of the Decision that "G4S failed to show that Mack working for interim employers for less than the 50 hours per week he worked for G4S should result in a deduction from his backpay."

Argument in Support:

Mack testified that he worked an average of 50 hours per week when employed by Respondent. (Tr. at 69-70.) The ALJ erroneously rejected any effort to account for that fact in calculating gross backpay or in the expectation that Mack should have been working, or seeking to work, approximately 50 hours per week during the entire period of time, as he did in the last half of 2015 and through the end of 2016. As such, his net backpay should be reduced by an

appropriate amount, at least $12.00 per hour for the difference between 50 hours and the actual amount of hours he worked in any given week in all other quarters during the relevant period of time.

The cases cited by the ALJ are not applicable to this situation. Respondent is not arguing that this issue goes to whether a particular job held by Mack constituted adequate employment. But it is unreasonable to calculate gross back pay based on a position in which Mack had to work 50 hours per week, with other positions that are standard, 40 hour per week positions, and not attempt to account for that distinction.

Exception No. 6:

In light of the testimony by Respondent's expert witness that security jobs were available during the relevant periods of time, Mack was qualified for those jobs and he could have been employed in such jobs during these periods of time, earning up to $40,000.00 per year (Tr. at 60-61, 85-86, 102-107, 111-115, 124-126, 131-132), the ALJ erroneously concluded in Section VI(B)(5) of the Decision that "G4S failed to show that Mack's efforts to find interim employment from February 2010 to August 2010, and from June 2011 to February 2012 were insufficient, and warrant reducing his net backpay."

Argument in Support:

Mack was unemployed from February 2010 to August 2010 and from June 2011 to February 2012. As set forth in the Specification, no interim earnings were shown for those periods of time, with the corresponding impact on net backpay for the quarters that included those periods of time. As explained in greater detail below, however, there were security jobs available during those periods of time, Mack was qualified for those jobs and he could have been

employed in such jobs during these periods of time, earning up to $40,000.00 per year. As such, either he should not be entitled to any back pay for those portions of the relevant quarters or, in the alternative, he should be considered to have interim earnings for those periods of time at the rate of $10,000.00 per quarter.

Claude Seltzer is a certified vocational rehabilitation counselor, who testified on behalf of Respondent. Among other things, he evaluates people who need to find jobs, the kinds of jobs that are available, what those jobs pay, etc. (Tr. at 102-105.) He has testified in approximately 700 legal proceedings on issues such as explanations about the labor market, access to the labor market, analysis of transferable skills, etc. (Tr. at 105.) Seltzer was accepted by the ALJ as an expert witness on the issue of what jobs were available in the Greater Miami area from February 2010 through April 2013, for which Mack was qualified. (Tr. at 105-106.)

In Seltzer's expert opinion, Mack was qualified to work as a security guard, and also as a supervisor in the security industry. From February 2010 through April 2013, there were numerous security industry positions available and for which Mack was qualified. (Tr. at 107, 111.) As a security guard, Mack could have earned approximately $30,000.00 per year. (Tr. at 112.) In addition, based on his experience and qualifications to work as a supervisor, Mack could have earned more, approximately $40,000.00 per year. (Tr. at 112-114.)

Seltzer was asked on cross-examination about whether security companies might have rejected Mack because he was overqualified and his opinion that Mack could have worked as a supervisor. In response, Seltzer explained that "a security company would – I think would be happy to offer a man with the qualifications that Mr. Mack has, and if he accepts it, then they

would." (Tr. at 124.) As he further explained, Mack had very good experience in the security industry since he worked at a nuclear power plant, which is a very responsible position. (Tr. at 125.) "[W]hen people go into security guard work, they are very quickly promoted if they show any kind of expertise, if they show that they have any kind of motivation. Security positions I think are fairly easy to get. But I think that it's fairly easy then when we have a good employee for the employee to be promoted rather quickly." (Tr. at 126.) On re-direct examination, Seltzer further explained that Mack was more qualified than the average person who would apply for a security officer position and, as such, it was more likely than not that a security company would have been willing to offer him a position and more likely than not that he would have been promoted fairly quickly to a higher position. (Tr. at 131-132.)

Seltzer also testified that, in his expert opinion, Mack did not use reasonable efforts to find a job during the relevant periods of time. Mack admitted that, throughout the relevant periods of time, he only submitted applications "on line." (Tr. at 60-61.) Unless a prospective employer asked him for some additional information, he did not take any action to follow up on any of those applications – no phone calls, no email message, no personal visits. (Tr. at 85-86, 114.) Seltzer explained that Mack should have gone in person to sites to attempt to interview in person and otherwise follow up in in person on his "on line" applications. (Tr. at 114.) As Seltzer further explained, even with new technology, it still is "always better to make an in-person effort than to just solely rely on let's say a telephone call or an internet job search." (Tr. at 115.)

For all these reasons, Mack did not meet his burden of mitigating his damages and the net backpay calculation should be reduced accordingly. Specifically, he should be deemed to have

earned at least $576.92 per week ($30,000.00 per year) for all weeks during which he did not otherwise have interim earnings from February 16, 2010 (two weeks after he was terminated by Respondent) to mid-August 2010 (when he was hired by Rent A Wheel) and from mid-June 2011 (when he was terminated from Rent A Wheel) until February 2012 (when he was hired by Rent a Center).

Exception No. 7:

In Section III of the Decision, the ALJ erroneously granted General Counsel's Motion to Strike the portions of Respondent's Answer to the Specification that challenged the backpay calculations under *F.W. Woolworth* and compensation for tax consequences under *Tortillas Don Chavas* and, as a result, failed to consider Respondent's substantive arguments on these issues and adjust his Order on page 11 of the Decision accordingly.

Argument in Support:

On May 11, 2018, General Counsel filed a Motion to Strike Portions of Respondent's Answer to Amended Compliance Specification ("Motion"), including portions that seek to challenge the application in this compliance proceeding of the Board's *Woolworth*[6] formula (calculation of back pay based on calendar quarters instead of years) and the Board's decision in *Tortillas Don Chavas*[7] (imposition of excess tax liability).[8] The ALJ granted this part of the

[6] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[7] *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

[8] General Counsel filed the Motion pursuant to Section 102.56(a), (b), (c) and (e) of the Board's Rules and Regulations. (Motion at 1.) It should be noted that, while the various subsections of Section 102.56 of the Board's Rules and Regulations set forth detailed requirements regarding a respondent's answer to compliance specifications, there is nothing in Section 102.56(a), (b), (c) or (e) that touches on any of the

Motion essentially on the basis that Respondent failed to raise such challenges in earlier proceedings before the Board and the Eleventh Circuit Court of Appeals.

As an initial matter, as a matter of course, the Board bifurcates its unfair labor practice proceedings, with the first phase focused on liability and, only if a respondent is deemed liable for a violation of the Act, a second phase focused on damages. Quite simply, it is not appropriate or fair to expect a respondent to raises issues based on somewhat esoteric concepts related to damages during the liability phase, simply because the Board made a passing reference to such concepts during that phase. Such an outcome would elevate form over substance, and otherwise bog down the liability proceedings by forcing the parties to spend time and resources arguing over theories of damages that might never come into play. While it might make perfect sense to hold a respondent to such limitations as a case moves from an administrative law judge, to the Board, to a circuit court on the issues related to liability, it does not makes sense to impose that same limitation when a case moves from the liability to the damages phase.

Moreover, there is no reason a respondent should be required to raise challenges based on the theories of calculating damages until it has been given the opportunity to review the manner in which the General Counsel will actually apply those theories to the case at hand, at which time the General Counsel converts a theoretical principle into actual numbers. In other words, it is unfair to expect a respondent to challenge such a doctrine until it sees whether imposition of that doctrine results in damages equal to $2.00 or $20,000.00, which does not occur until the Board issues a compliance specification after the liability phase of a case is complete. Any other

issues outlined in General Counsel's Motion specifically or General Counsel's right to file a Motion to Strike over any such issues generally.

outcome would force a respondent to raise arguments, and General Counsel to respond to those arguments, during the liability phase that could be rendered moot based on the outcome in that phase, thereby wasting all parties' resources.

For these reasons, the ALJ erroneously granted the relevant portion of the Motion and the Board should reverse that finding, and proceed to consider Respondent's substantive challenges on these issues.

Exception No. 8:

Since the imposition of "Excess Tax Liability" in this case is punitive rather than remedial, it was erroneous for the ALJ to refuse to exclude any such calculation from the Order, as set forth on page 11 of the Decision.

Argument in Support:

In addition to traditional back pay, the ALJ here also seeks to have Respondent pay Mack additional damages for "excess tax liability." Such a remedy first appeared in *Latino Express, Inc.*, 359 NLRB 518 (2012) – a routine case involving the allegedly discriminatory discharge of two employees during a union organizing campaign. The administrative law judge in that case found that the discharges violated Section 8(a)(1) and (3) of the Act, and ordered the employer to offer reinstatement to both and make them whole for any loss of earnings or other benefits. Interestingly, the judge's decision did not mention excess tax liability. Therefore, the judge did not make any findings that two employees would, in fact, suffer adverse tax consequences by receiving a lump sum backpay award.

The employer in that case filed exceptions to the judge's decision, and the acting general counsel in that case filed cross-exceptions, which included a request for the additional remedy of

reimbursement for any excess federal and state income taxes the discriminatees may owe as a result of the backpay award. Despite recognizing that the requested additional backpay remedy represented "a marked departure from Board practice," the Board adopted the acting general counsel's position regarding the imposition of excess tax liability.

At the time *Latino Express* was decided, however, the composition of the Board included two members whose appointments had been challenged as being unconstitutional. In light of the decision of the U.S. Supreme Court in *NLRB v. Noel Canning*, 573 U.S. __; 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid, the Board announced in *Tortillas Don Chavas*, 361 NLRB 10 (2014), that it had "considered *de novo* the rationale for the tax compensation," and found that the remedy effectuated "the policies of the Act," and thereby reestablished the *Latino Express* excess tax liability remedy.

Section 10(c) of the Act provides, in relevant part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."

In 1941, the U.S. Supreme Court examined the scope of the Board's authority under Section 10(c) of the Act in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). First, the Court observed that, "The powers of the Board as well as the restrictions upon it must be drawn from

Section 10(c) . . . ." *Id*. at 187-88. Second, the Court made clear that the Board's enforcement of the policies embodied in the Act necessarily required limited judicial review. *Id*.

Section 10(c) has long been understood to empower the Board with broad discretion to fashion remedies that will carry out the policies of the Act. However, excluded from the Board's authority is the ability to issue punitive or deterrent measures upon parties who have committed unfair labor practices. *See Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 235-36 (1938) ("We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order"). *See also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (parenthetical).

Although the Board tried to emphasize its remedial power under Section 10(c) in reaching its decision in *Latino Express,* and framed the decision as an exercise of those remedial powers, deterrence was clearly a factor in its decision. The Board specifically recognized excess tax liability as a type of punitive measure in a footnote, stating: "We adopt a tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders. In this respect, the new remedy aids in our statutory goal of preventing unfair labor practices." *Latino Express*, 359 NLRB at 520-521, n. 34 (citations omitted).

Even though it has long been established that the Board enjoys broad remedial powers under Section 10(c), it is equally well-settled that the Board does not have the authority to

impose punitive measures upon employers or unions to deter future misconduct. *Phelps Dodge, supra*; *Republic Steel Corp.,* 311 U.S. at 12 (1940). As the Supreme Court stated in *Republic Steel*, "The Board may fashion remedies that happen to deter unfair labor practices, but it may not premise a particular remedy on a deterrence rationale." *Id*. at 12.

It is an inescapable conclusion that deterrence was a clear motivational factor in the Board's *Latino Express* decision. Once again, the Board stated, "We adopt a tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders." 259 NLRB at 520-521, n. 34 (citations omitted). It is difficult (if not impossible) to imagine a respondent even contemplating the possibility of excess tax liability before taking adverse action against an alleged discriminatee. As a result, it is quite a stretch to categorize this remedy a deterrent – that is a remedy that prevents a discriminatory act from occurring. Rather, excess tax liability clearly seeks only to punish a respondent. As such, the Board should overrule *Latino Express* and excess tax liability should not be part of the damages calculation in this case.

Exception No. 9:

To avoid a potential windfall to an alleged discriminatee, it was erroneous for the ALJ to refuse to return to the Board's prior practice of calculating damages annually as opposed to quarterly, as reflected in the Order set forth on page 11 of the Decision.

Argument in Support:

The Act has been interpreted as "essentially remedial," *Republic Steel Corp.*, 311 U.S. at 10, meaning that Board orders should attempt to restore the situation to that which existed before any unfair labor practices occurred, and not provide alleged discriminatees with a windfall. *See*

Freeman Decorating Co., 288 NLRB 1235, 1235, n. 2 (1988) (the Board does not award tort remedies). However, under the Board's current approach to damages calculations, established in *F.W. Woolworth*, 90 NLRB 289 (1950), during a calendar year during the backpay period, an employee can make more money in interim earnings in a single calendar quarter than he or she made working for an entire year with the respondent, and still be entitled to backpay in the other three quarters of that calendar year during the backpay period. Such a result certainly seems punitive. *See Republic Steel*, 311 U.S. at 11 (Board not vested with "discretion to devise punitive measures").

Given that a fair calculation of back pay is more complicated when an alleged discriminatee has interim earnings which sometimes exceed estimated back pay, it is more reasonable for the Board to proceed on a case-by-case basis, rather than under a blanket rule requiring quarterly damages calculations. *See Cherokee Marine Terminal*, 287 NLRB 1080, 1081 (1988) (the Board refused to adopt a blanket rule requiring visitatorial clauses in all cases).

For example, in Title VII cases, whether to calculate damages quarterly or annually is vested in the court's discretion. The Sixth Circuit has denied all back pay compensation when a plaintiff's interim earnings exceeded her estimated back pay. *EEOC v. New York Times Broad. Serv., Inc.*, 542 F.2d 356, 359 (6th Cir. 1976) (noting that plaintiff "clearly was not damaged monetarily" where she later earned more than she would have in the position she sought). The Eighth Circuit has utilized an annual back pay calculation, such that if, in any given year, the plaintiff's earnings exceed her back pay award, the excess would not reduce the back pay owed in any other year. *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 693 (8th Cir. 1983) ("Under a year-by-year approach, when, as here, a plaintiff's interim earnings in any year exceed

the wages he or she lost due to the discrimination, that 'excess' must not be deducted from any back pay for other years to which the plaintiff is entitled"). Other federal courts have also utilized a year-by-year approach to calculate back pay. *See, e.g.*, *Harkless v. Sweeny Independent School District*, 466 F. Supp. 457, 22 F.E.P. Cases 1557, 1567 (S.D. Tex.), *aff'd*, 608 F.2d 594 (5th Cir. 1979); *United States v. Lee Way Motor Freight, Inc.*, 15 F.E.P. Cases 1385, 1388-1389 (W.D. Okla. 1977), *aff'd in relevant part*, 625 F.2d 918 (10th Cir. 1979).

While the Eleventh Circuit does calculate back pay on a quarterly basis, *Darnell v. City of Jasper, Ala.*, 730 F.2d 653 (11th Cir. 1984), other courts have declined to follow this approach on the theory that it departs from the "make whole" principle of Title VII and thus may result in a windfall to plaintiffs. *See, e.g.*, *Sinclair v. Ins. Co. of N. Am.*, 609 F. Supp. 397, 402 n. 3 (E.D. Pa. 1984), *aff'd sub nom*. *Appeal of INA Corp.*, 782 F.2d 1029 (3d Cir. 1986) and *aff'd sub nom*. *Appeal of Sinclair*, 782 F.2d 1031 (3d Cir. 1986) and *aff'd sub nom. Sinclair v. Cigna Corp.*, 782 F.2d 1031 (3d Cir. 1986) ("The *Leftwich* rule may assure that employers do not benefit from employee's 'excess' earnings. However, in my opinion, it has an overriding disadvantage of discouraging mitigation").

For the foregoing reasons, the Board should overturn its current practice of calculating damages on a quarterly basis, so as to avoid potential windfalls to alleged discriminatees.

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Certificate of Service

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